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Supreme Court, U.S.
FILED
JUN 10 1997
OFFICE OF THE CLERK

No. 96-1753

In The

Supreme Court of the United States

October Term, 1996

COUNTY OF NAPA,

Petitioner,

v.

VIOLET M. SCHUTT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

SANDRA L. SAVA
Counsel of Record

JONES & DYER
A Professional Corporation
1800 J Street
Sacramento, CA 95814
(916) 552-5959
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 pp

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The County of Napa submits this Supplemental Brief in Support of Petition for Writ of Certiorari, filed May 2, 1997, because the procedural status of the case below has changed, and a prior Ninth Circuit decision addressed in the Petition[1] has been amended.

I.

CHANGE IN PROCEDURAL STATUS

The Petition for Writ of Certiorari was filed May 2, 1997. On the same day, the United States District Court for the Northern District of California held a status conference and set a trial date of September 8, 1997 despite the pending Petition and despite petitioner's suggestion for a continuance and/or stay until this Court had decided to grant or deny certiorari and issue a ruling on the merits.

On May 28, 1997, respondent served on petitioner her Appearance Form/Waiver. On June 2, 1997, petitioner filed its Motion to Stay Mandate of United States Court of Appeals for the Ninth Circuit Pending Certiorari on the primary grounds that trial should not commence until this Court had an opportunity to decide whether to grant certiorari and, if so, to issue a decision on the merits. Petitioner anticipates filing a similar motion to stay with the United States Supreme Court in the event that the Ninth Circuit denies the motion or does not rule on it

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[1] Petition for Writ of Certiorari, pp. 21-22.

within a reasonable amount of time prior to the scheduled trial date.

II.

THE AMENDED DECISION IN *NIDDS v. SCHINDLER ELEVATOR CORP.*

The original *Nidds v. Schindler Elevator Corp.*[2] case was decided December 24, 1996. In it, the Ninth Circuit seemingly held that a Title VII plaintiff must do more at the pretext stage of the *McDonnell Douglas-Burdine* analysis than show that the employer's proffered reason was false. The court indicated that he must also offer some evidence that the real reason was discriminatory. This is so "even if the evidence supported an inference that the reasons given by [employer] were not its actual reasons. . . . "[3]

As originally decided, *Nidds v. Schindler Elevator Corp.* conflicted with *Washington v. Garrett*[4] which only required a showing that the employer's proffered reason was false. Petitioner addressed the intra-circuit split among the Ninth Circuit decisions at pages 21-22 of its Petition.

The amended *Nidds v. Schindler Elevator Corp.*[5] opinion was decided April 30, 1997 and printed in the Daily Appellate Report on May 1, 1997. It is substantially identical to the original decision except that the entire portion

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[2] Reported at 103 F.3d 854 (9th Cir. 1996)

[3] *Id.* at p. 859

[4] 10 F.3d 1421 (9th Cir. 1993)

[5] Reported at 1996 U.S. App. LEXIS 39997; 97 Daily Journal D.A.R. 5505

dealing with the pretext step was modified to reflect a standard more consistent with *Washington v. Garrett*. While the amended opinion arguably lessened the conflict with *Washington v. Garrett*, it did not do away with the overall intra-circuit split and only served to accentuate the difficulties the Ninth Circuit has had with interpreting and applying the pretext standard in discrimination cases.

The original *Nidds v. Schindler Elevator Corp.* decision was recently analyzed in the 1997 revision to the *California Practice Guide: Federal Civil Procedure Before Trial* (The Rutter Group 1997) and placed within the pretext category "View favoring employer."[6] In fact, the authors of this extensively used practice guide – Senior United States District Judge William W. Schwarzer, United States Circuit Judge (Ninth Circuit) A. Wallis Tashima and attorney James M. Wagstaffe – identify another Ninth Circuit decision[7] as falling within the same category. More importantly, however, following their discussion of the original *Nidds* decision, the authors recognize the national inter-circuit split and comment as follows:

> As indicated by the above cases, there is a fundamental split among the courts in this area. The issue is whether the employee must provide proof not simply that the employer's reason was pretextual, but that the employer acted with an intent to discriminate. The Supreme Court's earlier opinion in *Texas Dept. of Community Affairs v. Burdine* (1981) 450 US 248, 101 S.Ct. 1089,

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[6] *California Practice Guide: Federal Civil Procedure Before Trial* (The Rutter Group 1997), ¶14:159.13a, pp. 14-45 to 14-46.

[7] *Wallis v. J.R. Simplot Company*, 26 F.3d 885 (9th Cir. 1994)

required plaintiff to prove intentional discrimination. However, *St. Mary's Honor Center v. Hicks* (¶14:159.1) is ambiguous: It can be read as applying *Burdine,* but it can also be read as permitting a finding of discrimination simply on the basis of rejection of the employer's proffered reasons for its actions. *Until the Supreme Court speaks on this point again, the confusion will persist.*[8] (Emphasis added)

III.

CONCLUSION

For the reasons set forth in the Petition for Writ of Certiorari as well as this Supplemental Brief, petitioner respectfully requests that this Court grant certiorari.

Respectfully submitted,

SANDRA L. SAVA
JONES & DYER
A Professional Corporation
1800 J Street
Sacramento, CA 95814
(916) 552-5959
Counsel for Petitioner

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[8] *California Practice Guide: Federal Civil Procedure Before Trial* (The Rutter Group 1997), ¶14:159.14, pp. 14-46.